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NO. 88-141

In the Supreme Court of the United States

OCTOBER TERM, 1988

USX CORPORATION,
Petitioner,

v.

ELBERT G. GREEN and ROBERT DANLEY,
Respondents.

Reply Brief of Petitioner

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The purpose of this Reply Brief is neither to argue nor to re-argue the pertinent law. Nor is it to inform the Court of facts not already set forth in USX Corporation's ("USX") Petition for a Writ of Certiorari, because resolution of the vitally important issues presented in this case does not turn upon a factual dispute. Rather, the purpose of this Reply Brief is to correct two serious misstatements of the record contained in Respondents' Brief in Opposition ("Respondents' Brief") upon which respondents base their argument that certiorari should not be granted.

First, respondents represent that "[t]he ratio of black applicants called for final interviews with foremen was consistent with the ratio of blacks submitting applications." Respondents' Brief at 5. *See also id.* at 9 ("The evidence at trial clearly established that qualified blacks were disproportionately excluded during interviews with foremen.") and 11 ("Clearly, plaintiffs identified, with all the specificity required or possible, the USX employment practice causing the tremendous disparity—subjective foremen interviews."). Conspicuously absent from all of these assertions is any citation to the record.[1]

The truth is that there is absolutely nothing in the record or the District Court's opinion or findings isolating the role of the foremen in the interview process. The record does not contain the number, or even the percentage, of blacks being interviewed by the foremen or the number, or even the percentage, of blacks being accepted or rejected by foremen. The *only* evidence regarding the role of the foreman interview was that interviews were conducted by interviewers in the personnel office prior to

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[1]The absence of any citation to the record regarding the role of the foremen interviews is especially noteworthy in light of the presence of record cites throughout Respondents' Brief.

any interviews by foremen and that USX's Supervisor of Employment or General Supervisor of Personnel reviewed the foremen's reasons for any rejection and generally referred the applicant to another area that was then hiring. Tr. 203-206, 313-316, 426-429 and 474.[2] Respondents' attempt to dissuade this Court from granting certiorari by asserting that they isolated and identified the challenged employment practice is based upon this misstatement of the record.[3]

Second, respondents represent that they presented anecdotal evidence of intentional discrimination. The only evidence cited is the testimony of Sheila Walker. Respondents' Brief at 21 n.24. In fact, Ms. Walker's testimony was not in this case. Rather, plaintiffs introduced the transcript of her testimony in *Dickerson v. United States Steel Corp.*,

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[2]The only evidence of the percent of applicants contacted for interviews was one of plaintiffs' witnesses who testified that 20 to 30 percent of those contacted were black, Tr. 478, but plaintiffs presented no specific evidence on this point since their statistician did not analyze this step or any other step in the hiring process. Plaintiffs produced no evidence as to the rate of blacks or whites responding to the call-in, the rate of acceptance or rejection by personnel office interviewers, the rate of acceptance or rejection by the foremen or the rate that blacks or whites accepted USX job offers. As set forth in USX's Petition for Certiorari, plaintiffs' statistical expert admitted that he made no analysis of any of the steps in USX's multi-step hiring process and only compared initial applicant flow with final hire rate. *See, e.g.*, Petition for Certiorari at 5.

[3]This failure to present statistical evidence on the foremen interviews is important in light of this Court's holding in *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), that "the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities" and that the plaintiff must prove causation by "offer[ing] statistical evidence of a kind and degree sufficient to show that the practice in question caused the exclusion of applicants for jobs . . . because of their membership in a protected group." *Id.* at 2788-89.

472 F. Supp. 1304 (E.D. Pa. 1978)(Newcomer, J.), which testimony was explicitly discredited by Judge Newcomer. *See Dickerson*, 472 F. Supp. at 1315 (Ms. Walker's testimony was found not credible because she had a grudge against USX and against her personnel department superiors). Ms. Walker's testimony was also discredited by Judge Newcomer in her own unsuccessful case. *Walker Lampkin and Lovelace v. United States Steel Corp.*, No. 80-1090, slip op. at 5 (E.D. Pa. May 24, 1982)("[P]laintiff's testimony about several incidents in which she claims to have been harassed by her supervisors was simply not credible, in light of serious inconsistencies and misstatements brought out on cross-examination. I was left with the impression that Ms. [Walker] Lampkin[4] tends to interpret any criticism or imposition of discipline as harassment and that her memory tends to distort facts in order to make them more compatible with the theory that she is a victim of discrimination."). Accordingly, in holding that plaintiffs failed to establish a prima facie case of disparate treatment, the District Court, *i.e.* Judge Newcomer, found that "the defendant's lack of a hostile, discriminatory motive is unchallenged on this record." App. B, 106a.

[4]Ms. Walker's married name was Lampkin.

Respondents have misrepresented the record in an attempt to portray this case as one turning on an issue of fact and thereby dissuade this Court from granting certiorari. Because the fundamental issues presented in this case do not depend upon a question of fact, USX could not let respondents' serious misstatements of the record stand uncorrected.

Respectfully submitted,

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